Labour Relations – How to Prepare your Case for Arbitration

Labour, Employment & Human Rights Group Seminar
Thursday, September 18, 2014

Brian A. O’Byrne
Partner
+1 416 868 3347
bobyrne@fasken.com
Labour Relations – How to Prepare your Case for Arbitration

Labour, Employment and Human Rights Group
Brian O’Byrne
September 18, 2014

Preparation for Arbitration

1. Pre Grievance stage
   - Discharge cases
   - Other types of cases
2. Effective use of the Grievance Procedure
3. Meeting with your counsel to prepare for the arbitration
Pre Grievance Stage

- Important role played by HR
  - Sounding board
  - Advisor
  - Once a particular course of action has been decided on, make sure all the necessary facts have been obtained and that you will be able to prove those facts at arbitration
  - scribe

Pre Grievance Stage
HR as Advisor/Sounding Board

- Operational departments should always consult HR when planning to take any action that is likely to upset the union or is likely to result in a grievance being filed
- HR has the expertise and can provide a strong sounding board as well as advice on how best to proceed
- HR generally much more familiar with the collective agreement requirements
Pre Grievance Stage...cont’d

- Failure to follow certain collective agreement requirements can result in the action that was taken being declared null and void
- Examples:
  - Failure to have a union steward present when discipline being imposed
  - Failure to consult with the union prior to raising parking rates
  - Failure to provide the required amount of notice of layoff

Pre Grievance Stage
HR as coordinator for the facts and witnesses

- What facts is the Employer relying upon?
- How will the facts be proved?
- Can they be proved?
- Who will be the witnesses?
- What about bad facts?
Pre Grievance Stage
Sample Cases

• Discharge for sleeping on the job and ignoring patients
  • Facts needed
    • Who will be the witnesses
    • What about bad facts
    • Will there be evidentiary objections to video evidence.

Pre Grievance Stage
Sample Case

• Termination for AWOL
  • Facts needed
    • Interviewing grievor and getting his side of the story
    • Proving the facts
    • Proof that a letter was delivered to the grievor
    • Long delays – fading memories
    • Getting written statements
Pre Grievance Stage

• Importance of getting written documentation
  – interview notes, witness statements
• Dotting the “i”s and crossing the “t”s
• Will the witnesses agree to testify?

Grievance Procedure

• Use it as a form of discovery
• Find out what the grievor and union are saying
• Sort out what the facts are
• Assess the strengths and weaknesses of your case
• Consider settlement
Prior to Meeting with your Lawyer

- Use the attached checklists to compile a summary of the case and give it to the lawyer in advance so that the meeting can be productive
- Follow up on points that came up in the Grievance Procedure especially potential weaknesses in your case and how these can be addressed

Meeting with your Lawyer

- Go through the checklists
- Determine which witnesses will be called and the order in which they will be called
- Do some witnesses needed to be subpoenaed?
- If they do, serve them with the subpoena and appropriate “conduct money” a reasonable time in advance
- Obtain an affidavit of service from whoever served the subpoena
- Consider what documents the subpoenaed witness is to bring with her and list these in the Subpoena Duces Tecum
Meeting with your Lawyer...cont’d

- Consider whether a request for particulars should be made to the other party
- Consider requesting production of all relevant documents in the possession of the union and the grievor
- If a request for production is going to be made, do it well in advance of the hearing
  - give yourself sufficient time prior to the actual hearing to contact the arbitrator and have the arbitrator order production if the other party is not responding to your request.

Meeting with your Lawyer...cont’d

- Consider what you want to do on Day 1 of the hearing
  - Go right into arbitration or engage in mediation
  - If you want to engage in mediation, contact the other side and get their agreement on how the parties will proceed on Day 1
  - If, for example, it is agreed that Day 1 will be mediation only then no need to prepare witnesses in advance
  - If, on the other hand, arbitration will occur on Day 1, figure out who your witnesses will be on Day 1 and prepare them
Conclusion

- Proper preparation at every stage of the process will eliminate surprises and lead to the employer presenting the strongest possible case at arbitration.

Brian A. O'Byrne
+1 416 868 3347
bobyrne@fasken.com
REFERENCE MATERIALS
ARBITRATION REFERRAL FORM

1. UNION: ________________________________________________________________

2. TYPE OF GRIEVANCE: [ ] Individual [ ] Policy

3. NAME OF GRIEVOR-(if individual): ________________________________________

4. WHAT DOES THE GRIEVANCE ASSERT? - (copy out the words of the grievance):

   _______________________________________________________________________
   _______________________________________________________________________
   _______________________________________________________________________

5. REMEDY BEING SOUGHT - (copy out from the grievance):

   _______________________________________________________________________
   _______________________________________________________________________
   _______________________________________________________________________

6. WHAT ARTICLES OF THE COLLECTIVE AGREEMENT ARE ALLEGED TO HAVE BEEN VIOLATED?

   _______________________________________________________________________
   _______________________________________________________________________
   _______________________________________________________________________

7. WHAT STATUTORY PROVISIONS ARE ALLEGED TO HAVE BEEN VIOLATED?  
   - (if any)

8. GIVE BRIEF SUMMARY OF WHAT THE UNION’S POSITION IS:  

9. GIVE BRIEF SUMMARY OF WHAT THE EMPLOYER’S POSITION IS:  

10. ARE THERE ANY PRELIMINARY OBJECTIONS/ISSUES SUCH AS TIMELINESS OF 
    GRIEVANCE, PRIOR SETTLEMENT OR ARBITRATION AWARD ON SAME ISSUE?
11. HAVE THERE BEEN ANY SETTLEMENT PROPOSALS PUT FORWARD BY EITHER SIDE? IF SO WHAT HAS BEEN PROPOSED:

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

12. HOW MANY WITNESSES WILL THE UNION LIKELY CALL TO ESTABLISH THEIR CASE? WHO ARE THEY AND BRIEFLY OUTLINE WHAT EVIDENCE THEY WOULD BE EXPECTED TO GIVE:

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

13. HOW MANY WITNESSES WILL THE HOSPITAL NEED TO CALL TO ESTABLISH ITS CASE? WHO ARE THEY AND BRIEFLY OUTLINE THE EVIDENCE THEY WILL BE EXPECTED TO GIVE:

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________
CHECK LIST FOR ACCOMMODATION CASES*

1. Employee name :

2. Member of which bargaining unit? :

3. Seniority :

4. Employee’s classification :

5. Summarize the key elements/duties of the employee’s job and the relevant percentages of the employee’s work time that each of these key elements/duties represent :

6. What is the nature of the employee’s disability? :

7. What are the employee’s work restrictions? :

8. Has the employee requested accommodation? Is the request for temporary or permanent accommodation? :

9. What accommodation(s) has the employee asked for? (List details) :

10. Has the employee presented any medical documentation in support of the accommodation request? List the documentation and summarize it** :

11. Has the Employer’s occupational health physician become involved? Has he reviewed all the medical information presented by the employee and her doctor(s)? :

12. What position is the employee’s manager taking with respect to the employee’s request for accommodation? :

13. Has a representative of senior management been consulted and if so, what position is he/she taking with respect to the employee’s request for accommodation? :

14. What is Occupational Health’s position as to whether accommodation is needed and if so, what type of accommodation should be provided? :

15. Are there other positions available within the employee’s own classification which the employee could perform and which would be within her/his restrictions? If so, what are they? If not, are there other positions available in the workplace as a whole (whether within the employee’s own bargaining unit, another bargaining unit or in a non-union classification) which would be within the employee’s restrictions? If so, what are they? :
16. If there is suitable accommodation available in a department or program other than the employee’s own department or program, is the other manager/program director prepared to accept the employee into her program for purposes of providing the accommodation? :

17. Has the union been involved with the accommodation request? If so, what stance is the union taking in terms of what accommodation should be provided? :

18. Has a Grievance Meeting been held? :

19. What was the union’s position at the Grievance Meeting and what rationale did they put forward in support of their position? :

20. What is HR’s assessment of what should be done in this case? :

*This document is prepared for the Employer’s lawyer, in contemplation of litigation, and as such is privileged.

**In order for Human Resources to be able to effectively advise Occupational Health as well as the operational departments involved with respect to accommodation requests, an employee who is requesting accommodation should be asked to sign a consent form which would allow Occupational Health to share with the Director of Human Resources and the designated HR Specialist who will be assigned to the case, all medical information provided by the employee. The unions should be advised that this will be the Hospital’s practice and their support for this practice should be sought.
CHECK LIST FOR TERMINATION CASES*

1. Employee Name :

2. Member of which bargaining unit :

3. Last date of hire :

4. Seniority :

5. Prior discipline on record at time of termination :
   (List type of discipline date and basis for the discipline)

6. Reason for termination :

7. Provide summary of the facts giving rise to the decision to terminate :

8. Did employee have union representation at the time of termination? If so, who was there for the union? :

9. Who was there for management at the time of termination? :

10. Was a Grievance Meeting held? :

11. What was the union’s position at the Grievance Meeting and what was the rationale they put forward in support of their position? :

12. Who will be the Employer witnesses at the arbitration hearing and what facts will each of them be able to establish? :

13. Give your assessment of how each of the Employer’s witnesses will perform at the hearing? :

14. Have there been any settlement proposals by either side? If so, what were they? :

15. How important is this case for the Employer? :

16. How many witnesses is the union likely to call? Who are they and what are they likely to say? :

17. Give your assessment of how each of the union’s witnesses are likely to perform :

18. What is the Employer’s assessment of its prospects for winning the case? :
19. How many days do you see the hearing lasting? :

20. Is the Employer prepared to enter into a settlement as opposed to litigating the case? If so, what would the Employer be prepared to agree to in terms of a settlement? :

*This document is prepared for the Employer’s lawyer, in contemplation of litigation, and as such is privileged.
BIOGRAPHIES
Brian A. O’Byrne
Partner

Toronto

Direct Line: +1 416 868 3347
Facsimile: +1 416 364 7813
bobyrne@fasken.com
www.fasken.com/brian-obyrne

Brian O’Byrne practises labour relations, employment and human rights law. He provides general counsel and advice with respect to a variety of matters including restructurings and downsizings, employee terminations, employment agreements and policies, privacy rights, union organizational campaigns, collective agreement interpretation, workers’ compensation, pay equity, employment standards and occupational health and safety matters. Brian also represents clients in a full range of litigation matters involving employment, labour and human rights issues before the courts as well as the various tribunals that deal with these matters. He also spends a significant portion of his time negotiating collective agreements on behalf of both private and public sector clients and representing clients before interest arbitration boards. He has particular expertise in interest arbitrations having acted as counsel or employer nominee in well over 100 such cases.

Brian is a frequent speaker on various labour, employment and human rights issues at professional conferences and seminars. Over the last few years, he has spoken at such events in Canada’s major centres - Toronto, Montréal, Calgary and Vancouver as well as in the United States of America and England. He also conducts various seminars and training programs for clients.

Brian has also written various articles and commentaries on labour, employment and human rights issues. He is the author of the chapter on Canadian labour and employment law in the European Lawyer Reference book published by Thomson Reuters, entitled Labour and Employment Law and is also the editor of the Canadian Chapter in the textbook International and EU Employment Law published by Jordans in the United Kingdom.

Brian joined the firm as a partner in 1989.

Representative Experience

- Ontario Ministry of Correctional Services in public-private partnership agreement with Utah corporation
  Advised the Ontario Ministry of Correctional Services

Presentations

- Labour Relations – How to Prepare your Case for Arbitration, Labour, Employment and Human Rights Group Seminar (Fasken Martineau Institute), September 18, 2014
- Toronto Fasken Martineau Mini-Symposium, Fasken Martineau Institute, November 7, 2013
- Whistleblowing in the Long Term Care Sector, Health Group Seminar (Fasken Martineau Institute), February 12, 2013
Languages

English

Conference, April 5, 2012

- Toronto Fasken Martineau Symposium (1st Edition), Fasken Martineau Institute, April 27, 2011
- Tips for Accommodating Disability, Labour, Employment and Human Rights Group Seminar (Fasken Martineau Institute), September 22, 2010
- Human Rights Seminar, June 4, 2009
- Fasken Martineau National Human Rights Seminar, May 25, 2007
- National Human Rights Seminar, May 26, 2006
- Implementing Collaborative and Innovative Approaches to Public Sector Labour Relations, May 14-15, 2003

Publications

- "Hospitals and Foundations in Transition", Presentations by George Glover, Lynne Golding and Bryan O'Byrne, January 22, 2004

Memberships and Affiliations

- Member, Canadian Bar Association
- Member, Ontario Bar Association

Rankings and Awards

- *Chambers Global*
- *Best Lawyers in Canada*
- *Who's Who Legal* (International and Canadian editions)
- *The Legal Media Group's Guide to the World's Leading Labour and Employment Lawyers*
- Practical Law Company's *Which Lawyer?*